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No.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1987

OMNI U.S.A., INC.,

*Petitioner,*

v.

THE UNITED STATES,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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April 20, 1988

## QUESTIONS PRESENTED FOR REVIEW

1. Whether the ruling by the Federal Circuit that *ultra vires* acts by Customs officials are not null and void, and may start the statute of limitations running, shall be let stand, despite the ruling being in conflict with many holdings in this court including *Norton* v. *Shelby County*, 118 U.S. 425 (1886) and *Waite* v. *Macy*, 246 U.S. 606 (1917) and in other courts that *ultra vires* acts by public officers are null, void, and of no legal significance.

2. Whether the ruling by the Federal Circuit that Congress intended that *ultra vires* acts shall be deemed to have sufficient legal significance to start the statute of limitations running, shall be let stand, despite its being an erroneous reading of

Congressional intent and contrary to the void ab initio liquidation doctrine enunciated by the Court of Customs and Patent Appeals in United States v. C.O. Mason, Inc., 51 CCPA 107 (1964), cert. den., 379 U.S. 999 (1965) and in United States v. Cajo Trading, Inc., 55 CCPA 61, 403 F. 2d 268, cert. den., 393 U.S. 827 (1968), which doctrine was well known to the Congress.

3. Whether the ruling of the Federal Circuit that the bulletin notice of an ultra vires liquidation is adequate notice to the importing public that the public should defend its rights, shall be let stand, as it places an unwarranted burden on the importing public to check such notices to see if Customs officials are committing ultra vires acts.

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Petitioner,

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**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT**

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To the Honorable Chief Justice and the Associate Justices of the Supreme Court:

Omni U.S.A., Inc., petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

## OPINIONS BELOW

The decision of the U.S. Court of Appeals for the Federal Circuit on March 2, 1988 is to be reported at 6 Fed. Cir. (T) _____, ____ F.2d _____ (1988), and is printed in Appendix (hereinafter App.), infra, p. 1a. The opinion and judgment of the U.S. Court of International Trade, which the CAFC affirmed, is reported at 11 CIT _____, 663 F. Supp. 1130 (1987), and is printed in App., pp. 19a, 34a.

## JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C.A. 1254(1), 2101(c) and 2106. The judgment of the Court of Appeals for the Federal Circuit is dated, and was entered, on March 2, 1988.

## STATUTORY PROVISIONS INVOLVED

### Statutes

Customs Courts Act of 1980, Pub. L. No. 96-417, 94 Stat. 1727.

Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 144.

Customs Courts Act of 1970, Pub. L. No. 91-271, 84 Stat. 274.

Tariff Act of 1930, Pub. L. No. 768, 68 Stat. 1213.

19 U.S.C.A. 1500.

19 U.S.C.A. 1505.

19 U.S.C.A. 1514.

19 U.S.C.A. 1520.

19 U.S.C.A. 1671b(d).

28 U.S.C.A. 1581(a).

28 U.S.C.A. 1581(i)4.

Regulations

Exec. Order 12188, 3 C.F.R. at 131 (1981).

Countervailing Duties, 19 C.F.R. Part 355.

STATEMENT OF THE CASE

Pub. L. No. 96-39, effective January 1, 1980, repealed the prior statutory provisions under which the Secretary of the Treasury administered the countervailing duty program. Pub. L. No. 96-39 set forth a new program under which, by means of Exec. Order 12188, dated January 2, 1980, 3 C.F.R. at 131, published in 45 Fed. Reg. 989, the President of the United States transferred authority to administer the countervailing duty program to the Secretary of Commerce. On January 22, 1980, the International Trade Administration (hereafter ITA), to which the administration of the program had been assigned within the Department of Commerce,

issued regulations (19 C.F.R. Part 355 printed in 45 Fed. Reg. 4937 (1980)), with regard to countervailing duty matters, and on May 13, 1980, in 45 Fed. Reg. 31455 (1980), announced its intention to perform annual reviews, as required by the new legislation, on all outstanding countervailing duty orders which had been issued by Treasury.

Omni U.S.A., Inc. (hereafter Omni),[1] filed sixteen Customs entries during the period February 14, 1980 through September 18, 1980, covering the importation from Japan of industrial fasteners (nuts, bolts, etc.). This merchandise was subject to countervailing duty orders issued in 1977 (T.D. 77-128, 42 Fed. Reg. 23146 (1977)) and in 1979 (T.D. 79-158, 44 Fed. Reg. 31972 (1979)). The referenced ITA January 22,

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1. Omni U.S.A., Inc. has no parent company, or any subsidiaries or affiliates.

1980, notice included both T.D. 77-128 and T.D. 79-158 in its Annex III listing of "Countervailing Duty Orders Currently in Effect." As required by these T.Ds., Omni deposited estimated countervailing duties (CVD), in addition to regular duties, on each entry. During the period April 7, 1980 through October 23, 1980, Customs liquidated all the subject Omni entries for all deposited regular and countervailing duties, i.e. finalized the importer's liability to the Government on these entries as the monies deposited at the time of entry. The courts below, and the Government, conceded that these liquidations were erroneous, brought on in part, it is claimed, by Customs' reliance on the ITA's failure to list T.D. 79-158 in the May 13, 1980 notice (although T.D. 77-128 was listed). The liquidations were also contrary to the statutory scheme of the Trade Agreements Act

of 1979, spelled out in section 703(c), 19 U.S.C.A. 1671b(d), wherein it is clear that liquidation of entries under existing CVD determinations were to be suspended by Customs pending the outcome of the ITA reviews.

Subsequently, on October 29, 1981, ITA published the Final Results of the Administrative Review for 1979 (46 Fed. Reg. 53484-5 (1981)), which determined that lower countervailing duty rates applied than Treasury had determined, and announced in the same notice that it would undertake Administrative Review of countervailing duties to be imposed on entries made during 1980, during which period the petitioner's subject entries were made.

On October 13, 1982, within one year of the completion of ITA's first Administrative Review and before completion of ITA's Review for 1980, petitioner

-- alerted by refunds issued by Customs on 1979 entries to others and learning that its entries had been prematurely and erroneously liquidated -- submitted a claim for relief pursuant to 19 U.S.C.A. 1520 with regard to the erroneously liquidated 1980 entries. Omni alleged that the liquidations were premature, erroneous and void. Some three and one-half months later, on February 3, 1983, the ITA published the Final Results of the 1980 Administrative Review (48 Fed. Reg. 4864 (1983), see App., p. 39a), determining that no countervailing duties were owing for 1980.

On August 3, 1983, the Customs Service issued a ruling, No. 722226JL (see App., p. 38a for the portion of that ruling reproduced by respondent in its Answer below) holding that the Customs liquidation of entries of merchandise covered by T.Ds. 77-128 and 79-158 prior to the ITA's Administrative Review

were valid. Customs, on May 21, 1984, denied petitioner's 19 U.S.C.A. 1520 claim on the ground that it was untimely filed. On June 14, 1984, under 19 U.S.C.A. 1514, petitioner timely protested that denial. The protest itself was denied on September 9, 1985, and a summons was timely filed in the Court of International Trade on February 25, 1986. The complaint alleged that the Court of International Trade had jurisdiction pursuant to 28 U.S.C.A. 1581(a) and 1581(i).

The Court of International Trade granted defendant's cross-motion for summary judgment, Omni U.S.A., Inc. v. United States, 11 CIT ____, 663 F. Supp. 1130 (1987), App., p. 34a, and Omni appealed to the Court of Appeals for the Federal Circuit, where decision issued March 2, 1988, in Omni U.S.A., Inc. v. United States, Appeal No. 87-1602 (1988), see App., p. 1a,

affirming the opinion of the Court of International Trade.

REASONS FOR GRANTING THE WRIT

This is a test case in the international trade courts wherein importers seek relief from admittedly unauthorized acts by Customs officials liquidating hundreds if not thousands of entries of industrial fasteners from Japan with countervailing duties prior to Administrative Annual Review by the International Trade Administration of the Department of Commerce, which Review determined that such duties were not in fact to be assessed. The Government has sought to avoid the return of the monies unlawfully retained by contending that as its acts of liquidation were not protested within ninety days or the error of the liquidations nor brought to Customs' attention within a year thereof, the liquidations were final. The courts below have sustained the Government's

position (a) in spite of the void liquidation doctrine enunciated by the Court of Customs and Patent Appeals, the predecessor of the Court of Appeals for the Federal Circuit, in United States v. C.O. Mason Inc., 51 CCPA 107 (1964), cert. den., 379 U.S. 999 (1965) and in United States v. Cajo Trading, Inc., 55 CCPA 61, 403 F.2d 268, cert. den., 393 U.S. 827 (1968) grounded on this Court's opinion in Norton v. Shelby County, 118 U.S. 425 (1886) and (b) placing upon the importer the burden of checking bulletin notices of liquidation (i) to see if the Government is acting ultra vires and (ii) even though a numerical listing of entries "liquidated as entered" fails to give actual notice of a controversy with the Government.

I. Certiorari should be granted to reaffirm the doctrine that ultra vires acts by public officers are null and void, and without legal significance for both substantive and procedural questions.

The decision of the Federal Circuit in this case is contrary not only to a long line of cases in Customs jurisprudence[2] but to decisions of this court in Marriott v.

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2. Stubbs v. United States, 7 Ct. Cust. App. 339, T.D. 36967 (1917); United States v. Astra Bentwood Furniture Co., 28 CCPA 205, C.A.D. 747 (1940); United States v. C.O. Mason, supra,; United States v. Cajo Trading Inc., supra; Nozaki Bros., Inc. v. United States, 41 Cust. Ct. 245, C.D. 2048 (1958); Balfour, Guthrie & Co., Ltd. v. United States, 67 Cust. Ct. 143, C.D. 2621 (1966). See also, United States v. Schmidt Pritchard & Co., Mangano Cycles Co., 47 CCPA 152, C.A.D. 750, cert. den., 364 U.S. 919 (1960); United States v. Prym, 17 CCPA 180, T.D. 43475 (1929); Falcon Sales Co. v. United States, 47 Cust. Ct. 129, C.D. 2292 (1961), appeal dismissed, 49 CCPA 139 (1962); Pan American Standard Brands Company Inc. v. The United States, 43 Cust. Ct 122, C.D. 2115 (1959).

Brune, et al., 50 U.S. (9 How.) 619 (1850); Norton v. Shelby County, 118 U.S. 425 (1886); Waite v. Macy, 246 U.S. 606 (1917); Federal Trade Commission v. Raladam Co., 283 U.S. 643 (1931); Addison v. Holly Hill Fruit Products, Inc., 322 U.S. 607 (1943), and to decisions of other circuits in cases such as Director, Office of Workers' Compensation Programs, United States Department of Labor v. National Mines Corporation, 554 F. 2d 1267 (4th Cir., 1977); and United States v. Soto-Soto, 598 F. 2d 545 (9th Cir., 1979).

The principle that ultra vires acts by public officials are null and void with no legal significance is a basic principle which the appellate court below has chosen to ignore in view of its "certain want of enthusiasm for the void liquidation notion" (App., p. 14a). It has done so in reliance on its predecessor court's decision in The United States v. A.N. Deringer Inc., 66 CCPA

50, C.A.D. 1220, 593 F. 2d 1015 (1979), which we believe was arrived at on an erroneous reading of legislative history in a case in which there was no appearance by the successful importer-appellee below.

Neither the courts below nor the respondent could deny that the liquidations here in question were not within the authority of the Customs officials to make.[3] The CAFC opinion calls the liquidations "a particularly egregious mistake, the overlooking of an executive order transferring a function to another government agency." (App., p. 16a.) In fact, in Ambassador Division of Florsheim Shoe v. United States, 3 Fed. Cir. (T) 28, 748 Fed.

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3. The Court of International Trade stated that "There is some disagreement as to the legal necessity of suspension of liquidation at earlier stages, but it is clear that the post-May 1980 liquidations were not authorized." (App., p. 24a)

2d 1560 (1984), the Federal Circuit sustained the Government's contention that on January 1, 1980, pursuant to the Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 144, liquidation of all CVD entries entered under CVD orders in effect were to be suspended pending the results of the Administrative Reviews to be undertaken by the International Trade Administration of the Department of Commerce. The Florsheim decision was followed in American Permac Inc. v. United States, 10 CIT ____, 642 F. Supp. 1187 (1986).

In spite of the determination that the acts of the Customs officials here were ultra vires and the authority of the cases heretofore cited that such acts are null and void and without legal significance, the courts below gave legal significance to such unlawful liquidations on the authority of the Deringer case referred to above. The

Federal Circuit, in its opinion below, relied on Deringer and its holding that it was unnecessary to overrule the CCPA's decisions in the C.O. Mason, and Cajo Trading cases, supra.[4] In our brief to the Federal Circuit, we pointed out that there is nothing in the legislative history of the Customs Courts Act of 1970, Pub. L. No. 91-271, 84 Stat. 274, to support the contention that Congress had any intent to overrule Cajo and Mason by that legislation. We contended below that if the Congress intended to overrule a legal and administrative practice regarding void liquidations which extended back at least as far as the 1940 decision

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4. In that "Congress had already done so" [i.e. overruled the CCPA], referring to "19 U.S.C. 1500(d), as amended in 1970, which eliminated prior language as to what Customs officers should do 'as provided by law' which language had been relied on by the court in Mason as the basis for the void liquidations doctrine." App. pp. 13a, 14a.

in United States v. Astra Bentwood Furniture Company, supra, and included the Mason and Cajo decisions, supra, the Congress would have verbalized its repudiation of the practice. Indeed, we pointed to the evidence in the legislative history that Congress approved of Mason and Cajo.

In its opinion, the Federal Circuit noted (App., p. 15a):

> "Our present appellant argues that the Court in Deringer misapprehended the purpose of the change, which was to restate the duties of the former collectors and appraisers of customs, offices which before 1970 had been merged into a single person the statute since 1970 has called 'the appropriate customs officer'. Suppose this is true, it does not restore Cajo and Mason to any position requiring obeisance by us."

We had pointed out in our brief below that the way the words "as provided by law" were eliminated from the statutory language in 19 U.S.C.A. 1500(d) supported our

contention that Congress did not intend thereby to overrule Mason and Cajo. What happened was that the entire provision in the former 19 U.S.C.A. 1505 in which these words appeared was split into two parts. The one part of that Section 505, dealing with the payment of duties, remains more or less the same under Pub. L. No. 91-271 in the amended Section 505 (19 U.S.C. 1505). The other part of the former Section 505, dealing with liquidations by the collector, was transferred under Pub. L. No. 91-271 to Section 500 (19 U.S.C. 1500), in which was previously set forth only the duties of the appraising officer. The revised Section 500 provides one set of tasks, both appraisement and collection, for the new "appropriate customs officer." Thus, the one new officer, the District Director, replaced the two former officers: the appraiser and the collector.

In this move of the duties of the collector from Section 505 to Section 500, the task of liquidation was enumerated merely as paragraph (d) "liquidate the entry of such merchandise." It would have looked very strange to have counseled the new "appropriate customs officer" that he had to liquidate "as provided by law," while such a stricture was not leveled at him with respect to his other enumerated duties in paragraphs (a) - (c) and (e). Instead, one would suppose, it was judged by Congress that the direction "The appropriate customs officer shall, under rules and regulations prescribed by the Secretary - . . . [do the following] . . . ." was sufficient to put the District Director on notice to meet the standard of legality in the performance of all his important legal tasks therein enumerated: (a) appraise, (b) classify, (c) fix the amount of duty, (d) liquidate, and

(e) give notice of liquidation. Why should one task be less or more required to be "as provided by law" than the others?

With all respect to the Deringer court, the "demise" of the language arguably relied on in Mason was the result of a linguistic restructuring of the Tariff Act to reflect a more orderly and unified way of accomplishing the Customs mission, and is not evidence of intent to overrule Mason and Cajo or to condone illegal acts. Indeed, if the phrase "as provided by law" were crucial to Mason, does the deletion of those words in Pub. L. No. 91-271 imply (1) that liquidations not in accordance with law are now permissible and (2) that Congress omitted those very words because it had Cajo and Mason in mind? We submit the answers are "No" and "No".

We also referred the Federal Circuit to direct evidence in the legislative

history that the deletion of these words was not intended to eliminate prior law, and that the new wording was intended to carry over all prior law intact. H.R. Rep. No. 1067, 91st Cong., 2d Sess. 25, 26. In fact at page 17 of said H.R. Rep. No. 1067, the Mason, Cajo, and Astra Bentwood cases are cited with approval as authority that premature protests, i.e., those that are filed prior to liquidation, are consistently dismissed by the courts for want of jurisdiction, and the Congress observed that where liquidations are declared void, the protests involved are dismissed by the court as premature on the theory that liquidations have not occurred.[5]

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5. H.R. Rep. No. 1067, 91st Cong., 2d Sess., 17, reprinted in 1970 U.S. Code Cong. & Admin. News No. 2, at 3203:

> "Even in instances where liquidations were declared void as not in

Unfortunately, the Federal Circuit's

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(cont.)

> accordance with the statutory requirement or based on an unlawful Presidential proclamation or executive order, the courts have dismissed the protests on the ground that they were premature, there having been no valid liquidations. U.S. v. Cajo Trading Inc., 55 C.C.P.A. 61, C.A.D. 934 (1968); U.S. v. C.O. Mason, 51 C.C.P.A. 107, C.A.D. 844, cert. denied 379 U.S. 999 (1965); U.S. v. Astra Bentwood Furniture Co., 28 C.C.P.A. 205, C.A.D. 147 (1941)."

* * *

Id at 3211:

> "Except for the deletion of the requirement under existing law for the issuance of a separate formal notice of appraisement, the amendment of section 500 of the Tariff Act is not intended to elminate any requirement imposed by existing law."

* * *

Id at 3212:

> "Section 204(c) of this title amends section 505 of the Tariff Act by deleting reference to (1) receipt

reaction to our exploration of the legislative history regarding the deletion of the phrase "as provided by law" upon which the Deringer court relied, possibly because of the lack of an adversarial proceeding, did not move the CAFC because of its obvious dislike for the void ab initio liquidation theory. Perhaps this was a dislike which the writer of the opinion had borne since his days as Commissioner of Customs. Be that as it may, it is evident that the decision below, in emphasizing the inapplicability in Customs law of the law

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(cont.)

by a collector of various reports which will no longer be prepared and (2) the performance of certain functions in connection with the liquidation of an entry. The remaining text is reworded without substantive change. The deleted provisions have been more appropriately incorporated in the general description of functions set forth in section 204(a) of title II." [Section 500.]

developed with regard to ultra vires acts by government officials, has not only put that Circuit in conflict with decisions of this court and other courts, but has seemed to give carte blanche to Customs officials' actions contrary to law where they are not detected and complained of within the very short statute of limitations applicable to those actions taken according to law. The unlawful acts here were egregious and carried out over a period of time even after several notices in the Federal Register and internally which would normally have required those officials to desist from their unlawful acts. We believe it essential that the Court grant the writ so as to reemphasize the principle that the Government must bear the consequences of the ultra vires actions of its officials and return to its citizens unlawfully retained duties, particularly when, as here, the

Government has been apprised of the unlawful actions in seasonable time, considering all the facts.

II. In failing to give recognition to the seasonableness of petitioner's administrative petition, the lower courts have placed a harsh, impracticable and inequitable burden on importers to look for notice of ultra vires acts.

Petitioner sought administrative relief of these liquidations within one year of the Government's announcement of its administrative review of the 1979 entries and its intention to review the 1980 entries. Section 520(c) of the Tariff Act of 1930, 19 U.S.C.A. 1520(c), provides relief with respect to a "clerical error, mistake of fact . . . in any . . . liquidation . . . brought to the attention . . . within one year after the date of liquidation or exaction." The courts below agreed with the Government that the one-year period from

"liquidation" had been exceeded by Omni and, therefore, Omni was not entitled to any relief. We contended below, and reiterate here, that there has been no legal liquidation in the instant record and that the supposed liquidations are null and void. Therefore, there can be no way to count the one year period, as the time period has not begun to run. Further, we respectfully suggested that in seeking administrative relief, Omni was acting within the intent of Section 520(c) by bringing the need for correction to the attention of Customs within a year of the time when the Government announced its intention to review administratively the 1980 entries. Further, the 520(c) protests were filed even prior to the ITA Determination as to the proper amount to be exacted as countervailing duty for 1980 entries, which turned out to be zero. The existence of error "a mistake of

fact or inadvertence" was admitted by Customs in its Headquarters Ruling of August 3, 1983, referred to by the defendant in paragraph 14 of its Answer. (App., p. 38a.)

It is important to note that Section 520 does not contain any statutory requirement that acts as a bar to showing the one year period in which to file had not commenced to run. The language that entranced the court in Deringer, C.A.D. 1220, that the "legality" of a liquidation could only be attacked by a timely filed protest, does not exist in Section 520. Thus, the Government was put on notice three and one half months before it completed its review of the 1980 entries at hand, and it would have been within the spirit of Section 520(c) had the Customs Service granted relief, particularly where Commerce was reviewing the very entries, which had

presumably been "liquidated," in connection with its administrative review.

Petitioner believes that the courts below should, at the least, have looked at this matter equitably and afforded petitioner (and the other importers involved) the opportunity to recover monies which had been mistakenly retained without authority of law by Customs officials. The courts' denial of such equitable relief was on the ground that there was available an adequate remedy at law on the basis of the bulletin notices of liquidation listing the entries at bar as having been liquidated "as entered." Thus the courts have placed upon importers the duty of checking bulletin notices of liquidation, at the numerous Customs houses where their merchandise is imported, even during the period when there should be no liquidations under law, in the eventuality that the Government has

unlawfully liquidated them. We believe that this is an unreasonable requirement and is the other side of the coin of the presumption usually accorded the Government that it has acted according to law. The importers ought to be able to rely on the presumption and not do useless acts of having agents throughout the country check bulletin notices of liquidation for unauthorized liquidations. It is also harsh to deprive the petitioner here of its monies where it is likely that even if any of its brokers or agents had noticed liquidations of petitioner's entries, they would not have been put on notice that something was wrong in the sense that the list would merely have shown an entry number, the name of the petitioner-importer, and the fact that it had been "liquidated as entered". There being no indication of any increase in duties found on liquidation, the local-agent would

undoubtedly assume that there was no problem involved.

There is, and can be, no contention of laches here. The petitioner acted as promptly as it could, once it had discovered the Government had proceeded to liquidate entries in spite of the statutory requirement that such entries subject to outstanding countervailing duty orders on January 1, 1980, were not to be liquidated until the Department of Commerce had given instructions following the results of Administrative Reviews. The decision below is completely contrary to the position taken by the Government and sustained by the courts in Florsheim Shoe and Permac, supra. Although these cases were cited in our briefs below, the Federal Circuit did not refer to them.

Prior to the passage of the Customs Courts Act of 1980, Pub. L. No. 96-417, 94

Stat. 1727, the Customs courts did not possess power to grant equitable relief. We believe that all else having failed, the courts below should have exercised that power in the instant case to prevent unjust enrichment through the wrongful retention of funds. The courts below should have on the basis of the facts, the law, and equity found for the petitioner and ordered the Government to liquidate the entries in accordance with law. However, the Federal Circuit's obvious dislike for the void ab initio liquidation doctrine enunciated in C.O. Mason and Cajo Trading, supra, in conformity with the law as interpreted by this court, led it to disregard the principles of law and equity and to arrive at an unjust and erroneous conclusion.

## CONCLUSION

In denying petitioner relief, the Federal Circuit has misread the law as set

forth in the decisions of this court, other courts of appeals, and its predecessor court, and has seemingly countenanced unlawful acts of Customs officials which are not detected within the short statutory period set by Congress to protest lawful actions by Customs officials. This court should grant the writ so that it may reiterate and reestablish in Customs law the principle that ultra vires acts of government officials are null and void and should be given no legal significance. If importers or others affected by ultra vires acts of Customs officials do not bring the matter to their attention seasonably after their discovery, the Government is protected by being able to raise the defense of laches. Therefore, the Government is not hurt either in the pocket or in the administration of customs laws where it is empowered to correct unlawful actions, such as retention of

duties belonging to importers as in the circumstances at bar. The Federal Circuit has applied a narrow and erroneous construction to the statutes intended to relate to actions lawfully taken by Customs officials and placed an unrealistic and heavy burden on importers to in effect police the every day activities of Customs officials in liquidating entries of merchandise. The resolution of the issue as to the effect of ultra vires acts in customs litigation is an important issue

which should be accepted by this court for resolution.

Respectfully submitted,

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Of Counsel:

Robert H. Schor
April 20, 1988

# APPENDIX

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

87-1602

OMNI U.S.A., INC.,

Plaintiff-Appellant,

v.

THE UNITED STATES,

Defendant-Appellee.

Andrew P. Vance, Barnes, Richardson & Colburn, of New York, New York, argued for plaintiff-appellant. With him on the brief was Robert H. Schor.

Sheila N. Ziff, Commercial Litigation Branch, Department of Justice, of Washington, D.C., argued for defendant-appellee. With her on the brief were Richard K. Willard, Assistant Attorney General, David M. Cohen, director and Velta A. Melnbrences, Assistant Director. Also on the brief was Alfonso Robles, Attorney Advisor, U.S. Customs Service, of counsel.

Appealed from: U.S. Court of International Trade

Judge Restani

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

87-1602

OMNI U.S.A., INC.,

Plaintiff-Appellant,

v.

THE UNITED STATES,

Defendant-Appellee.

---

DECIDED: March 2, 1988

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Before BISSELL, Circuit Judge, NICHOLS, Senior Circuit Judge, and ARCHER, Circuit Judge

NICHOLS, Senior Circuit Judge.

Omni U.S.A., Inc. (Omni) appeals a judgment of the Court of International Trade dismissing Omni's complaint upon defendant's motion for summary judgment.

The court held it had no jurisdiction because Omni's reliquidation request under 19 U.S.C. § 1520(c) had been untimely. 11 CIT_____, 663 F. Supp. 1130 (1987). We agree and affirm.

Facts

Omni, in 1980, made various entries of Japanese fasteners through the port of Seattle. There was at that time a Treasury order, TD 79-158, 44 Fed. Reg. 31972 (June 4, 1979), requiring deposit of estimated countervailing duties (CVD) upon entry of such articles, and deposit was accordingly required. The order gave notice the estimates were subject to review. By Exec. Order No. 12,188, effective January 2, 1980, 3 C.F.R. at 131 (1981), the President had transferred administration of such countervailing duties to the Department of Commerce, which published a notice of its intent to review all CVD orders then in

effect, but by inadvertence and mistake the notice failed to list, with other orders, TD 79-158. Customs therefore failed to hold the liquidation of the entries involved in this litigation in suspense, as it should have done, and liquidated at the entered rates including the deposits for estimated CVD. These were at the rates of 4.2 or 4 percent. By a further mistake, Omni failed to realize that this had occurred. It is not disputed that proper constructive notice was given by posting in the customhouse, and counsel says Omni simply failed to observe the unfavorable significance of liquidations "as entered," in that context. Later on Commerce, on its review, determined that no CVD was owing on 1980 entries of these fasteners and Omni expected to commence receiving refunds as other importers were doing. Only too late did it realize, counsel says, that it was precluded

from receiving refunds by the finality of the erroneous liquidations. On October 13, 1982, it requested reliquidations under authority of 19 U.S.C. § 1520(c)(1), but this request was over a year after all the liquidations and therefore came too late to activate the statute according to its terms. Therefore, the original liquidations were considered final and binding on all persons under section 1514. Omni, however, protested the section 1520 refusal to reliquidate within the required time after the refusal.

## The Statute

Title 19 U.S.C. § 1520 reads in part as follows:

**Cases in which refunds authorized**

(a) The Secretary of the Treasury is authorized to refund duties or other receipts in the following cases:

(1) Excess deposits.--Whenever it is ascertained on liquidation or reliquidation of an entry that more money has been deposited or paid as duties than was required by law to be so deposited or paid;

* * * * *

**Authorization of appropriations**

(b) The necessary moneys to make such refunds are authorized to be appropriated annually from the general fund of the Treasury.

**Reliquidation of entry**

(c) Notwithstanding a valid protest was not filed, the appropriate customs officer may, in accordance with regulations prescribed by the Secretary, reliquidate an entry to correct--

(1) a clerical error, mistake of fact, or other inadvertence not amounting to an error in the construction of a law, adverse to the importer and manifest from the record or established by documentary evidence, in any entry, liquidation, or other customs transaction, when the error, mistake, or inadvertence is brought to the attention of the appropriate customs officer within one year

after the date of liquidation or exaction; or

* * * * *

Discussion

I

Section 1520(c)(1) appears to fit the present case like a glove. It is a statutory instrumentality that is, according to its terms, exactly and precisely suited to deal with an instance, such as here described: customs officers have liquidated entries "as entered" when they should not have done so, because somebody inadvertently failed to inform them by suitable listing that entries of Japanese fasteners were to be suspended from liquidation pending review by the new masters of the CVD cases, at the Department of Commerce. It is an "other inadvertence not amounting to an error in the construction of a law, adverse to the importer * * *."

This is too obvious to dispute. If Omni had alerted customs to the error it had committed within a year, its right remained to protest any refusal to reliquidate under section 1514, and to carry the case to the court. On the other hand, the chance for customs to correct its own errors was also preserved, and following the statute would save customs from having to be a defendant because of an error it was ready to acknowledge. If customs elected to correct an acknowledged error, section 1520(a) gave the requisite authority to pay the refunds out of the annual Treasury appropriation. Without this added authority, acknowledgement of the mistake would have been an academic exercise. Further, the one-year limitation assured that whatever errors might lurk in the record would cease to have practical significance after a short time had elapsed--short in the eyes of history--but long

enough for an informed and reasoned business decision. It is noteworthy that section 1520(c)(1) is for the protection of importers and there is no correlative provision for increase of duties in case the error was adverse to the government.

This court has several times held that statutory procedures for administrative correction of errors and for judicial review of refusals to acknowledge or correct error, are binding on all concerned including the time limitations within which valid actions may be taken. The most recent instance is National Corn Growers Association v. Baker, No. 87-1147 (slip op. Feb. 9, 1988). In that opinion others are cited and quoted. Our adherence to this salutary rule has been undeviating.

Since nobody brought the errors to the attention of the appropriate customs officers within a year of the date of

liquidation, authority to correct them lapsed according to the term of section 1520(c)(1), the refusal by customs to correct them upon untimely notice was correct, and was the only course open to them. It is the duty of Congress to provide for payment of the just debts of the United States (Const. art. I, sec. 8), but Congress also has authority, not disputed here, to quiet money claims against the United States, not asserted according to reasonable procedures Congress has prescribed. The only question Omni raises is whether Congress has effectively done so.

II

National Corngrowers leaves open any possible instance of a void liquidation. The challenge Omni posed before the Court of International Trade, and here, was that because the purported liquidations were

ultra vires, they were also null and void. Therefore, the court must pretend they did not occur. Since there were no liquidations, there was nothing for section 1520 to apply to and neither it nor its time limitations apply at all. Asked how then he would be able to get refunds out of the Treasury, since section 1520(a) would not apply, counsel responded that he relied on equitable relief under 28 U.S.C. § 1581(i).

The complaint in the Court of International Trade pursues relief under three counts. Count I is for a taking without due process of law in violation of the fifth amendment, and alleges unequal assessment of duties violating article I, section 8 of the Constitution. Count II alleges the section 1520(c) petition was timely and retention of the money results in unjust enrichment. Count III alleges the protest was timely since the entries had been

liquidated without authority of law. While Omni asserts before us that notice of the liquidations was inadequate, there is no count based on that issue and the Court of International Trade does not mention it. From statements in oral argument, we believe the contention really is not that notice was not given, but notice that certain entries were "liquidated as entered" did not alert Omni, or its customhouse broker, that a mistake had been made adverse to it. We think the adequacy of notice is not a separate issue for us to decide, but an added circumstance for the assertion of unjust enrichment.

The essence of the argument, to which all else is adornment, is that the Court of International Trade wrongly cited United States v. A.N. Deringer, Inc., 593 F.2d 1015 (CCPA 1979), as authority rejecting the

void liquidation theory as no longer valid in this court.

In Deringer our predecessor, the Court of Customs and Patent Appeals, was asked to overrule two of its previous holdings, United States v. Cajo Trading, Inc., 55 CCPA (Customs) 61, 403 F.2d 268, cert. denied, 393 U.S. 827 (1968), and United States v. C.O. Mason, Inc., 51 CCPA (Customs) 107 (1964), cert. denied, 379 U.S.999 (1965). Those two cases applied the "void liquidation" theory to arrange for the survival of certain issues which should have been laid to rest by failure to follow statutory protest and review procedures. The court in Deringer declined to overrule them saying that Congress had already done so. In support of that statement it referred to 19 U.S.C. § 1500(d), as amended in 1970, which eliminated prior language as to what customs officers should do "as provided by

law" which language had been relied on by the court in Mason as the basis for the void liquidations doctrine. 51 CCPA (Customs) at 113. Deringer now stated at 593 F.2d 1020-21:

> Removal of this stipulation further enhances what we perceive to be a pervasive requirement throughout the statute to channel all nonexcepted protests through § 1514 even when those protests go to the legality of a custom official's [sic] action.
>
> Since the protest to the liquidation was not timely filed, the complaint was properly dismissed although the correct basis is lack of jurisdiction

We detect in this language a certain want of enthusiasm for the void liquidation notion as stated in the Cajo and Mason cases. Perhaps some relief was felt that the need to consider overruling them did not arise. Since section 1500(d) as revised in 1970 is still in the statute, clearly we are not obliged to follow Cajo and Mason. As applied to the present law, they either were never

authority, or if they were, are discredited. Our present appellant argues that the court in Deringer misapprehended the purpose of the change, which was to restate the duties of the former collectors and appraisers of customs, offices which before 1970 had been merged into a single person the statute since 1970 has called "the appropriate customs officer." Suppose this is true, it does not restore Cajo and Mason to any position requiring obeisance by us.

Our want of enthusiasm for the void liquidations doctrine matches that of the Deringer court. It appears to be an abstraction having no function except to thwart the efforts of Congress to identify issues of fact and law for prompt administrative or judicial disposition, and to put permanently to rest issues not thus promptly identified for disposition. Specifically with respect to section

1520(c)(1), the doctrine is invoked to make section 1520(c)(1) inapplicable to a case where it applies by its own plain language and is needed as much as anywhere. No one could impute to Congress any rational reason for excluding section 1520(c)(1) from applying because it was a particularly egregious mistake, the overlooking of an executive order transferring a function to another government agency. Moreover, section 1520(c)(1) does not apply to mistaken liquidation only. It applies to "other customs transactions." If a liquidation is not a liquidation because it is void, why is it not an "other customs transaction?"

Appellant's view, if it prevailed, apparently would, wherever applicable, deny customs officials the authority they now have to correct mistakes and refund overpayments. The sole authority to do this

would reside in the court's supposed equitable powers which, however, are not as sweeping as appellant supposes in view of the analysis in National Corngrowers and other cases. Suppose they are broad enough, it is hardly a result we would care for to compel litigation when there is no real dispute, simply because customs officers cannot correct what they recognize as errors without colliding with this mysterious doctrine.

Accordingly, we agree with the Court of International Trade that occasion to apply equitable doctrines under the supposed authority of 28 U.S.C. § 1581(i) does not arise because the legal remedy is adequate. It is not made inadequate simply because appellant failed to invoke it within the time frame it prescribes. Miller & Co. v. United States, 824 F.2d 961, 964, ___ Fed. Cir. (T) ___ (1987), cert. denied, 56

U.S.L.W. 3497 (1988). See also American Air Parcel Forwarding Co. v. United States, 718 F.2d 1546, 1551, 2 Fed. Cir. (T) 1, 6-7, cert. denied, 466 U.S. 937 (1984); United States v. Uniroyal, Inc., 687 F.2d 467, 471 (CCPA 1982).

## Conclusion

The Court of International Trade rightly dismissed the complaint in this case because it was founded on a refusal to reliquidate an erroneous liquidation under 19 U.S.C. § 1520(c)(1), which refusal was justified because the error had not been brought to the attention of customs officials within the time prescribed in the statute, and therefore jurisdiction to effect correction under that statute had lapsed.

AFFIRMED

Slip. Op. 87-77

**UNITED STATES COURT OF INTERNATIONAL TRADE**

| | | |
|---|---|---|
| OMNI U.S.A., INC., Plaintiff, | : | Court No. 86-2-00256 |
| v. | : | |
| THE UNITED STATES, Defendant. | : | |

[Defendant's motion for summary judgment is granted.]

Decided: June 30, 1987

Barnes, Richardson & Colburn (Andrew P. Vance), for plaintiff.

Richard K. Willard, Assistant Attorney General, David M. Cohen, Director, Commercial Litigation Branch (Sheila N. Ziff), Civil Division, United States Department of Justice, for defendant.

**OPINION**

RESTANI, Judge: Plaintiff, an importer of metal fasteners from Japan,

challenges denial of a protest of a refusal to reliquidate. The parties cross-move for summary judgment.

## FACTS

In June 1979, the Treasury Department published in the Federal Register an order covering certain industrial fasteners from Japan. 44 Fed. Reg. 31972 (June 4, 1979) (T.D. 79-158). The order required deposit of estimated countervailing duties (CVD), indicated that the net amount be reviewed "upon receipt of information of the precise benefit received ...," and purported to be a "Countervailing Duty Order." 44 Fed. Reg. at 31972.

Prior to the liquidation of the entries at issue, the administration of the CVD program was transferred to the Department of Commerce (Commerce) by Executive Order No. 12188, effective January 2, 1980. Exec.

Order No. 12188, 3 C.F.R. 131 (1981), reprinted in 19 U.S.C. § 2171 app. at 968-69 (1982). In May 1980, Commerce published a notice of its intention to review, on an annual basis, all CVD orders then in existence. Although the parties agree that the fasteners covered by T.D. 79-158 were intended to be included in the notice, the attached list of existing orders to be reviewed did not mention T.D. 79-158. Customs thus continued liquidating entries of Japanese fasteners at the duty rate set forth in the CVD order.

Liquidation of all of the entries at issue occurred in 1980. On October 13, 1982, plaintiff filed a request for reliquidation essentially seeking reliquidation at the rate to be established by the 1980 annual review determination. A review decision relating to the year 1979 alerted plaintiff to the lower duty rate to be expected. This

rate was later set at zero, as opposed to the original four percent estimated figure. 48 Fed. Reg. 4864 (February 3, 1983). Reliquidation was denied as untimely requested. Protest of the refusal to reliquidate was denied on September 9, 1985. Suit was filed here on February 26, 1986, challenging that denial.

## ARGUMENTS

19 U.S.C. § 1520(c) (1982) allows reliquidation despite failure to file a timely (within ninety days of liquidation) protest of liquidation under 19 U.S.C. § 1514 (1982 & Supp. III 1985) if a mistake of fact affecting the liquidation is brought to Customs' attention within one year of the liquidation. Plaintiff concedes that it did not file its request for reliquidation within one year of the 1980 liquidations. Plaintiff argues instead that the original

liquidations may not stand because they are void. Plaintiff's voidness argument is based on the CVD laws.

Plaintiff argues that the original order, T.D. 79-158, required estimates only and never directed liquidation. Furthermore, plaintiff argues no liquidation was possible once authority for CVD cases was transferred to the Commerce Department, whereupon new regulations were issued governing cases subject to Treasury Department orders. Regulations governing the "transition" cases were promulgated on January 22, 1980. The regulations made all outstanding CVD orders subject to annual review. 19 C.F.R. § 355.41(a) (1981). [1] As indicated, the following May the Commerce

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1. This provision requiring annual review in all cases was deleted after the time period at issue here. 50 Fed. Reg. 32559 (Aug. 13, 1985). See 19 U.S.C. § 1675 (Supp. III 1985).

Department actually ordered the annual reviews. The parties seem to be in agreement that once annual review was ordered the basic principles of 19 U.S.C. §§ 1671d and 1675 (1982 & Supp. III 1985) applied and liquidation implicitly was ordered suspended. There is some disagreement as to the legal necessity of suspension of liquidation at earlier stages, but it is clear that the post-May 1980 liquidations were not authorized.

Although defendant does not concede that the liquidations were illegal and void, it seems clear that defendant's main argument is that "illegal" or not, at some point a posted "liquidation" finally resolves the question of the amount of duties owing on an entry, and at that point judicial relief is not available.

SUIT PREDICATED ON 28 U.S.C. § 1581(a) JURISDICTION

Basically, there are two jurisdictional provisions under which plaintiff might proceed in order to obtain relief. One is 28 U.S.C. § 1581(a) (1982), providing for judicial review of a denial of a protest. Plaintiff clearly filed suit in a timely manner after its protest of the reliquidation decision was denied. Plaintiff, however, may obtain no relief if its underlying reliquidation request under 19 U.S.C. § 1520(c) was untimely. [2] Except in a few inapplicable situations, only a timely section 1520(c) request will stay the finality of a liquidation once ninety days

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2. 19 U.S.C. § 1520(c) Allows correction of factual or clerical error if Customs is advised of the error within one year of liquidation or exaction. Plaintiff does not argue that no exaction occurred. Its argument is limited to the "nonexistence" of liquidation.

have passed without the filing of a protest of the liquidation. 19 U.S.C. § 1514(a).

Plaintiff argues that its request was timely because the liquidation, having not yet occurred legally, could not start the running of the section 1520(c) time period. Unfortunately for plaintiff, such attempts to avoid the administrative time limits which condition suit under 28 U.S.C. § 1581(a), have been rejected in a decision of one of the predecessors of the Court of Appeals for the Federal Circuit, United States v. A.N. Deringer, Inc., 66 CCPA 50, 593 F.2d 1015 (1979). In Deringer, contrary to a regulation, liquidation occurred early.[3] It was not protested timely. The court held that challenges to the legality of liquidations must be made through the

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3. The liquidations in Deringer were as "illegal" or "ultra vires" as the ones at issue here.

protest route. Sections 1514(a) and 1520(c) are both part of that route and their time limits apply. As far as suit under section 1581(a) is concerned, the court cannot distinguish Deringer from the case at hand.

SUIT PREDICATED ON 28 U.S.C. § 1581(i) JURISDICTION

In several recent related opinions the court assumed jurisdiction and ordered collection of additional duties following final liquidation where ultra vires acts had resulted in improper liquidation. National Corn Growers Assoc. v. Baker, 9 CIT ___, Slip Op. 85-98, at 5-6 (Sept. 20, 1985), 9 CIT ___, 623 F. Supp. 1262, 1266-71 (1985), 10 CIT ___, 636 F. Supp. 921, rehearing denied, 10 CIT ___, 650 F. Supp. 172 (1986), appeal docketed, No. 87-1147 (Fed. Cir. Jan. 14, 1987). The court relied on 28 U.S.C. § 1581(i) (1982), the residual jurisdiction

provision, and 28 U.S.C. § 1585 (1982), which gives the court all of the equitable powers of a district court.[4] The court found as a preliminary matter, however, that the traditional means of obtaining judicial review were unavailable or "manifestly inadequate." See United States v. Uniroyal, 69 CCPA 179, 187, 687 F.2d 467, 475 (Nies, J. concurring).

In another case, Miller and Co. v. United States, 8 CIT 281, 598 F. Supp. 1126 (1984), appeal docketed, No. 87-1083 (Fed. Cir. Nov. 26, 1986), the court stated that under certain narrow circumstances, if an action undertaken in administering the CVD laws is ultra vires, plaintiff may be relieved of its duty to participate in the administrative proceedings required for 28

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4. Sections 1581(i) and 1585 were not in effect at the time of Deringer.

U.S.C. § 1581(c) (1982) jurisdiction, but may proceed under section 1581(i). The Miller case differs significantly from the one at hand, not because it involves 28 U.S.C. § 1581(c) as opposed to (a), but because the opinion was based on the premise that it would be inappropriate and futile to require plaintiff to appear before an agency which in connection with the issue at hand consciously acted in a patently "ultra vires" way. 8 CIT at 286, 598 F. Supp. at 1131. In other words, the administrative remedy would not be legally adequate in such a situation. [5] In this case, it would not have been futile for plaintiff to assert its objection by way of

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5. The court reserved decision on whether the action was "patently ultra vires," id., and ultimately found it was not. Miller v. United States, 10 CIT ___, 648 F. Supp. 9, appeal docketed, No. 87-1083 (Fed. Cir. Nov. 26, 1986).

protest. The agency's unauthorized action was both inadvertent and overt and thus should have been protested in 1980.

Plaintiff argues that as a matter of fact, if not law, it was deprived of its protest right because it was not alerted to look for liquidation at a time when liquidation legally could not occur. The answer is the same as it was in Deringer. The importer has the burden to check for posted notices of liquidation and to protest timely. Plaintiff did not make out a case of no valid notice. Accordingly, there is no legally sufficient element of surprise which rendered the normal administrative avenues unavailable here.

The court finds the case of Star Sales Distributing Corp. v. United States, 10 CIT ___, Slip Op. 86-117 (Nov. 7, 1986)

dispositive. [6] In an almost identical action to the one at hand the court rejected section 1581(i) jurisdiction because, unlike the situation in National Corn Growers, the traditional remedies were legally adequate. The court found that there was no basis for granting section 1581(i) jurisdiction merely because section 1581(a) rights had been lost. That case is stare decisis here and as the above reasoning indicates, is not

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6. Contrary to plaintiff's argument, the concessions made by the parties in Star Sales do not distinguish it from the case at hand. As was conceded in Star Sales, the court finds here that T.D. 79-158 is the equivalent of a CVD order and both courts assume, at least for the sake of plaintiffs' argument, that Customs acted in an illegal manner in not suspending liquidation.

clearly erroneous.[7]

Thus, plaintiff is left to its ordinary

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7. Section 1581(i) jurisdiction also may be unavailable if more than two years have passed following accrual of the cause of action under section 1581(i). See 28 U.S.C. § 2636(h) (1982). Actions complaining of illegal acts may be barred by statutes of limitations. See, e.g., DeBonis v. United States, 103 F. Supp. 123 (W.D.Pa. 1952). Exactly when the claim accrues under section 1581(i) is not entirely clear. Accrual may be affected by how the claim is characterized or how pursuit of administrative remedies is viewed. Unlike section 1581(a) jurisdiction, section 1581(i) jurisdiction is not predicated on exhaustion of mandatory administrative remedies. The general rule is that pursuit of permissive administrative remedies does not toll running of the statute of limitation or delay accrual of the cause of action. See Lipp v. United States, 301 F.2d 674 (Ct. Cl. 1962) cert. den. 373 U.S. 932 (1962). Exhaustion of such remedies may take so long that the purpose of the statute, that of barring stale claims, is defeated. On the other hand, courts have held that the encouragement of non-judicial resolution of disputes warrants tolling in some instances. See Galino v. Stoudy Co., 793 F.2d 1502, 1510 (9th Cir. 1986) (fair representation claim tolled during

remedies. It did not file a timely request for reliquidation and its protest, therefore, was validly denied. Plaintiff's attempt to avoid the operation of the administrative statutes of limitation must fail.

For all of the foregoing reasons the court grants defendant's motion for summary judgment.

Jane A. Restani
JUDGE

Dated: New York, New York
This 30th day June, 1987.

(cont.)
pursuit of grievance procedures.) Another court defined the same situation as non-accrual of the cause of action. Adkins v. International Union of Electrical Radio Workers, 769 F.2d 330, 335-36 (6th Cir. 1985). As this issue was not argued by the parties and the court otherwise has found no basis for section 1581(i) jurisdiction, this issue will not be resolved here.

**JUDGMENT**

UNITED STATES COURT OF INTERNATIONAL TRADE

JANE A. RESTANI, JUDGE

| | |
|---|---|
| OMNI U.S.A., INC., Plaintiff, | Court No. 86-2-00256 |
| v. | |
| THE UNITED STATES, Defendant. | |

This case having been duly submitted for decision and the Court, after due deliberation, having rendered a decision herein; now, in conformity with said decision,

**IT IS HEREBY ORDERED:** that defendant's motion for summary judgment is granted and that this case is dismissed.

Jane A. Restani
JUDGE

Dated: New York, New York

This 30th day of June, 1987.

**Section 500, Tariff Act of 1930, 19 U.S.C.A. 1500**

**§ 1500. Appraisement, classification, and liquidation procedures**

The appropriate customs officer shall, under rules and regulations prescribed by the Secretary--

(a) appraise merchandise by ascertaining or estimating the value thereof, under section 1401a of this title, by all reasonable ways and means in his power, any statement of cost or costs of production in any invoice, affidavit, declaration, other document to the contrary notwithstanding;

(b) ascertain the classification and rate of duty applicable to such merchandise;

(c) fix the amount of duty to be paid on such merchandise and determine any increased or additional duties due or any excess of duties deposited;

(d) liquidate the entry of such merchandise; and

(e) give notice of such liquidation to the importer, his consignee, or agent in such form and manner as the Secretary shall prescribe in such regulations.

**Section 520 Tarifff Act of 1930, 19 U.S.C.A. 1520**

**§ 1520. Refunds and errors**

**Cases in which refunds authorized**

(a) The Secretary of the Treasury is authorized to refund duties or other receipts in the following cases:

(1) Excess deposits. - Whenever it is ascertained on liquidation or reliquidation of an entry that more money has been deposited or paid as duties than was required by law to be so deposited or paid;

(2) Fees, charges, and exactions. - Whenever it is determined in the manner required by law that any fees, charges, or exactions, other than duties and taxes, have been erroneously or excessively collected; and

(3) Fines, penalties and forfeitures. - Whenever money has been deposited in the Treasury on account of a fine, penalty, or forfeiture which did not accrue, or which is finally determined to have accrued in an amount less than that so deposited, or which is mitigated to an amount less than that so deposited or is remitted.

**Authorization of appropriations**

(b) The necessary moneys to make such refunds are authorized to be appropriated annually from the general fund of the Treasury.

**Reliquidation of entry**

(c) Notwithstanding a valid protest was not filed, the appropriate customs officer may, in accordance with regulations prescribed by the Secretary, reliquidate an entry to correct -

(1) a clerical error, mistake of fact, or other inadvertence not amounting to an error in the construction of a law, adverse to the importer and manifest from the record or established by documentary evidence, in any entry, liquidation, or other customs transaction, when the error, mistake, or inadvertence is brought to the attention of the appropriate customs officer within one year after the date of liquidation or exaction; or

(2) any assessment of duty on household or personal effects in respect of which an application for refund has been filed, with such employee as the Secretary of the Treasury shall designate, within one year after the date of entry.

**Paragraph 14 to Defendant's Answer to the Complaint in this Case.**

14. On August 3, 1983, the United States Customs Service issued a ruling (722226JL) holding that:

> 1. Liquidations of entries of merchandise covered by T.D.'s 77-128 and 79-158 are valid and became final as to both the Government and importers 90 days after the date of notice of liquidation, unless Protests were timely filed pursuant to 19 U.S.C. 1514.
>
> 2. Requests for reliquidation under 19 U.S.C. 1520(c)(1) claiming mistake of fact, inadvertance (sic), etc., because of subsequent determinations by the Department of Commerce that countervailing duties should be reduced are not allowable.
>
> 3. Entries of merchandise covered by T.D.'s 77-128 and 79-158 which were liquidated in contravention of the suspension orders issued by the Department of Commerce were liquidated as a result of a mistake of fact or inadvertance and may be reliquidated at the lower countervailing duty rates if relief was requested in a timely-filed application pursuant to 19 U.S.C. 1520(c)(1), or a timely-filed Protest under 19 U.S.C. 1514.

**Federal Register**

Vol. 48, No. 24, page 4864
Thursday, February 3, 1983

**DEPARTMENT OF COMMERCE**

International Trade Administration

Certain Fasteners From Japan; Final Results of Administrative Review of Countervailing Duty Order

**AGENCY:** International Trade Administration, Commerce

**ACTION:** Notice of final results of administrative review of countervailing duty order.

---

**SUMMARY:** On December 6, 1982, the Department of Commerce published in the **Federal Register** the preliminary results of its administrative review of the countervailing duty order on certain fasteners from Japan. The review covered the period January 1, 1980 through December 31, 1980. The notice stated that the Department had preliminarily determined the net subsidy to be 0.15 percent ad valorem, a rate the Department considers to be de minimis.

Interested parties were invited to comment on our preliminary results. We received no comments. Based on our analysis, the final results of the review are the same as those presented in the preliminary results of review.

**EFFECTIVE DATE:** February 3, 1983

**FOR FURTHER INFORMATION CONTACT:**
Joseph A. Black or Kenneth K. Haldenstein, Office of Compliance, International Trade Administration, U.S. Department of Commerce, Washington, D.C. 20230; telephone: (202) 377-2786.

**SUPPLEMENTARY INFORMATION:**

**Background**

On December 6, 1982, the Department of Commerce ("the Department") published in the **Federal Register** (47 FR 54840) the preliminary results of its last administrative review of the countervailing duty order on certain fasteners from Japan (42 FR 23147, May 6, 1977; 44 FR 31972, June 4, 1979). The Department has now completed that administrative reivew.

**Scope of the Review**

Imports covered by the review are all fasteners currently classifiable under Items 646.5400 and 646.5600, and non-metric fasteners currently classifiable under items 646.1700, 646.4000, 646.4100, 646.4920, 646.4940, 646.5100, 646.5300, 646.5800, 646.6020, 646.6040, 646.6320, 646.6340, 646.6500, 646.7200, 646.7400, 646.7500, 646.7600, and 646.7800, of the Tariff Schedules of the United States Annotated. The review covers the period January 1, 1980 through December 31, 1980, and two programs found countervailable in the final determinations plus other lending programs that were included in our last review.

**Final Results of the Review**

Interested parties were invited to comment on our preliminary results. We received no comments. Based on our analysis, the final results of our review are the same as those presented in the preliminary results of review. We determine that the aggregate net subsidy for the period was 0.15 percent ad valorem.

Because the aggregate net subsidy is less than 0.5 percent and therefore de minimis, the Department will instruct the Customs Service not to assess countervailing duties on any shipments of certain fasteners from Japan entered, or withdrawn from warehouse, for consumption on or after January 1, 1980 and exported on or before December 31, 1980.

Further, the Department will instruct the Customs Service not to collect a cash deposit of estimated countervailing duties, as provided for by section 751(a)(1) of the Tariff Act of 1930 ("the Tariff Act"), on any shipments of this merchandise entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice. This deposit waiver shall remain in effect until publication of the final results of the next administrative review.

The Department intends to conduct the next administrative review by the end of May 1983. The amount of countervailing duties to be imposed on exports made during 1981 will be determined in that review. Consequently, the suspension of liquidation previously ordered will continue for all entries of this merchandise exported on or after January 1, 1981.

The Department encourages interested parties to review the public record and

submit applications for protective orders, if desired, as early as possible after the Department's receipt of the information in the next administrative review.

This administrative review and notice are in accordance with section 751(a)(1) of the Tariff Act (19 U.S.C. 1675(a)(1)) and § 355.41 of the Commerce Regulations (19 CFR 355.41).

**Gary N. Horlick,**
Deputy Assistant Secretary for Import Administration.

January 28, 1983

Supreme Court, U.S.
FILED
JUN 29 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1743

# In the Supreme Court of the United States

OCTOBER TERM, 1987

OMNI U.S.A., INC., PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

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## QUESTION PRESENTED

Whether the court of appeals and the Court of International Trade correctly held that petitioner's claim for reliquidation of certain customs entries was time-barred under 19 U.S.C. 1520(c)(1) by virtue of its failure to file a claim within the one-year period provided under that statute.

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# In the Supreme Court of the United States

OCTOBER TERM, 1987

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No. 87-1743

OMNI U.S.A., INC., PETITIONER

*v.*

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT*

---

## BRIEF FOR THE RESPONDENT IN OPPOSITION

---

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 840 F.2d 912. The opinion and judgment of the Court of International Trade (Pet. App. 19a-34a) are reported at 663 F. Supp. 1130.

### JURISDICTION

The judgment of the court of appeals was issued on March 2, 1988. The petition for a writ of certiorari was filed on April 21, 1988. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. On May 6, 1977, the United States Department of the Treasury (Treasury) published a countervailing duty (CVD) order, T.D. 77-128, 11 Cust. B. 242, 42 Fed. Reg. 23146, imposing countervailing duties on certain fasteners imported from Japan into the United States.[1] The order covered fasteners that were classifiable under certain item numbers contained in the Tariff Schedules of the United States (TSUS) and that were entered into the United States or withdrawn from a warehouse for consumption on or after May 6, 1977. On June 4, 1979, as a result of a petition filed on March 23, 1979 (44 Fed. Reg. 17851), Treasury published T.D. 79-158, 13 Cust. B. 366, 44 Fed. Reg. 31972, a final CVD determination and order imposing countervailing duties on industrial fasteners from Japan that were classified under the same TSUS item numbers as those fasteners covered by T.D. 77-128 (as well as certain additional items) and that were entered or withdrawn from a warehouse for consumption on or after June 4, 1979. Except for a brief period in June 1979, entries of Japanese fasteners covered by T.D. 79-158 were liquidated and assessed with countervailing duties pursuant to that order.[2]

On January 2, 1980, the administration of the CVD program was transferred to the Department of

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[1] Pursuant to 19 U.S.C. 1303, a special duty, termed a "countervailing duty," is imposed on imports that have benefited from a bounty or grant prior to import. See *Zenith Radio Corp.* v. *United States*, 437 U.S. 443 (1978).

[2] "Liquidation" is the final computation or ascertainment of the duties owed on a particular entry of merchandise. 19 C.F.R. 159.1.

Commerce (Commerce) by Exec. Order No. 12,188, 3 C.F.R. 131 (1981). On May 13, 1980, Commerce published a notice advising the public of its intention to review annually all CVD orders then in existence. 45 Fed. Reg. 31455. The notice included a list of existing orders to be reviewed. The list included the original Japanese-fastener order, T.D. 77-128, but did not include the subsequent order, T.D. 79-158, which covered the fasteners at issue here.

The May 1980 notice by Commerce did not call for any suspension of liquidation of entries. On August 22, 1980, however, pursuant to instructions from Commerce, the Customs Service advised all field personnel by telex to suspend liquidations of entries of merchandise subject to various cited pending CVD orders. The telex listed the first Japanese-fastener order, T.D. 77-128, but not the second, T.D. 79-158. Consequently, entries subject to T.D. 79-158 continued to be liquidated. That process was ultimately halted on November 26, 1980, by a telex from Customs to its field personnel.

2. Between February 14, 1980, and September 18, 1980, petitioner made 16 entries of industrial fasteners from Japan that were covered by T.D. 79-158, and it deposited the estimated countervailing duties for each entry. Those entries were liquidated between April 7, 1980, and October 23, 1980, and were assessed with countervailing duties at the estimated CVD deposit rate established by T.D. 79-158. Petitioner did not file a protest challenging the assessment of countervailing duties within 90 days after receiving notice of liquidation, as authorized by 19 U.S.C. 1514; nor did it request reliquidation on the ground of clerical error within one year after the

notice of liquidation, as authorized by 19 U.S.C. 1520(c)(1).[3]

On October 29, 1981, Commerce published a notice of "Final results of administrative review" for 1979. 46 Fed. Reg. 53485. That administrative review, which covered fasteners entered in 1979 and subject to T.D. 77-128 and T.D. 79-158, set substantially lower CVD rates for unliquidated merchandise classifiable under the TSUS item numbers that applied to petitioner's 1980 entries. The notice also declared that the net subsidy found for fasteners classifiable under other TSUS item numbers covered by T.D. 77-128 and T.D. 79-158 was de minimis and that, therefore, shipments of merchandise classifiable under those numbers and entered between June 4, 1979, and December 31, 1979, were to be liquidated without any contervailing duties. A subsequent review reached essentially the same result for 1980 entries. 48 Fed. Reg. 4864 (1983).

3. On October 13, 1982, almost two years after liquidation of its last entry on October 23, 1980, petitioner submitted a petition to the Customs Service, requesting, pursuant to 19 U.S.C. 1520(c), reliquidation of its 16 entries of industrial fasteners in 1980. Petitioner argued that there had been a clerical error in the assessment of countervailing duties on those

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[3] Section 1520(c) provides that the Customs Service may reliquidate an entry to correct a "clerical error, mistake of fact, or other inadvertence not amounting to an error in the construction of a law, adverse to the importer * * *, when the error, mistake, or inadvertence is brought to the attention of the appropriate customs officer within one year after the date of liquidation or exaction * * *."

entries. Of course, because petitioner's entries were all liquidated before October 23, 1980, the petition was not filed within one year after liquidation, as required by 19 U.S.C. 1520(c)(1).

On August 3, 1983, the Customs Service issued a ruling that stated, inter alia, that liquidations of entries of merchandise covered by T.D. 77-128 and T.D. 79-158 were valid and became final as to both the government and importers 90 days after the date of notice of liquidation, unless protests were timely filed pursuant to 19 U.S.C. 1514 or a request for reliquidation had been timely filed pursuant to 19 U.S.C. 1520(c)(1). On May 21, 1984, petitioner's request for reliquidation was denied as untimely on the basis of the Customs Service ruling. On June 4, 1984, petitioner protested, pursuant to 19 U.S.C. 1514, the denial of its Section 1520(c) petition. The protest was denied, again on the basis of the Customs Service ruling.

4. Petitioner instituted this action in the Court of International Trade (CIT) within 180 days after the denial of its protest, claiming that it was entitled to relief under Section 1520(c)(1) or to equitable relief under 28 U.S.C. 1581(i). Relying on *United States* v. *C.O. Mason, Inc.*, 51 C.C.P.A. 107 (1964), cert. denied, 379 U.S. 999 (1965), and *United States* v. *Cajo Trading, Inc.*, 55 C.C.P.A. 61, 403 F.2d 268 (1968), cert. denied, 393 U.S. 827 (1968), petitioner asserted that the liquidations of its 16 entries were void and that, therefore, those liquidations did not begin the one-year period for requests for reliquidation under Section 1520(c)(1). It also argued that *United States* v. *A.N. Deringer, Inc.*, 66 C.C.P.A. 50, 593 F.2d 1015 (1979), which held that *Cajo* and

*Mason* were no longer controlling, had been incorrectly decided.[4]

Relying on *Deringer*, the trial court rejected petitioner's argument that the liquidations were void and therefore could not have started the running of the one-year period specified in Section 1520(c).[5] Accordingly, the court concluded that it lacked jurisdiction because petitioner's request for relief under Section 1520(c)(1) was untimely. The court also rejected petitioner's claim that the liquidations at issue were ultra vires acts that could be reviewed by the court pursuant to the grant of residual jurisdiction in 28 U.S.C. 1581(i). Observing that Section 1581(i) jurisdiction was available only when the more specific means of obtaining review were unavailable or "manifestly inadequate" (Pet. App. 28a (citation omitted)), the court held that it would not have been futile for petitioner to have asserted its objection by way of a timely protest (*id.* at 29a-30a). In particular, the court rejected petitioner's claim (which was not raised in the pleadings or briefs, but mentioned for the first time at oral argument) that it

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[4] In *Cajo* and *Mason*, the Court of Customs and Patent Appeals (CCPA) applied the "void liquidation" theory to permit the survival of claims that otherwise would have been barred by failure to follow statutory protest and review procedures. Under the "void liquidation" theory, ultra vires liquidations are void and therefore do not trigger statutory procedures and time limits. In *Deringer*, the CCPA held that that theory was no longer tenable, noting the intervening 1970 amendments to 19 U.S.C. 1500(d).

[5] The court observed that 19 U.S.C. 1520(c) allows correction of factual or clerical errors "if Customs is advised of the error within one year of liquidation *or exaction*," noting that petitioner did "not argue that no exaction occurred" but, rather, limited its argument to the "nonexistence" of any liquidation. Pet. App. 25a n.2 (emphasis added).

had not been alerted to look for liquidations at a time when they should not have occurred. The court responded that, as in *Deringer*, it is the importer's burden "to check for posted notices of liquidation and to protest timely" (Pet. App. 30a). Since petitioner "did not make out a case of no valid notice," there was "no legally sufficient element of surprise which rendered the normal administrative avenues unavailable here" (*ibid.*).

5. The United States Court of Appeals for the Federal Circuit affirmed (Pet. App. 1a-18a). The court first held that "Section 1520(c)(1) appears to fit the present case like a glove" because the liquidation of petitioner's 1980 entries by mistake was due to an "' * * * inadvertence not amounting to an error in the construction of a law, adverse to the importer'" (Pet. App. 7a, quoting 19 U.S.C. 1520(c)(1)). Petitioner's claim was plainly out of time under that squarely applicable provision. The court then rejected (Pet. App. 10a-18a) petitioner's reliance on the "void liquidation" theory espoused in *Mason* and *Cajo* and cited by petitioner as a basis for salvaging its untimely protests.

The court of appeals explained that the *Mason/Cajo* theory had been eliminated by statute in 1970 and discredited by its predecessor court in *Deringer* in 1979, so that *Cajo* and *Mason* were not binding (Pet. App. 13a-14a). In any event, the court continued, there is no good reason to disturb the overruling of *Mason* and *Cajo*. Even if the *Deringer* court had misapprehended the purpose of the 1970 statutory change, that factor could "not restore *Cajo* and *Mason* to any position requiring obeisance," because the void liquidation doctrine served only to thwart Congress's aim to identify legal and factual

issues for prompt disposition and to place to rest all issues not so identified (Pet. App. 15a). Not only does Section 1520(c)(1) apply "by its own plain language," the court concluded, but the time limit on correction of errors is as necessary in this case as in others to which it applies (Pet. App. 16a).[6] The court accordingly agreed with the trial court that the Section 1520(c)(1) protest mechanism was adequate and that this case thus presented no occasion to apply equitable doctrines "under the supposed authority of 28 U.S.C. § 1581(i)" (Pet. App. 17a).[7]

## ARGUMENT

The concurrent decisions of the Court of International Trade and of the Federal Circuit—the specialized tribunals Congress has established to resolve customs disputes of the kind presented here—are correct and do not conflict with any holding of this Court. Nor do they conflict with decisions of any other court of appeals, and no such conflict will arise given the exclusive jurisdiction of the CIT and the Federal Circuit in this area. Further review is therefore not warranted.

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[6] The court also suggested (Pet. App. 16a-17a) that, if Section 1520(c)(1) did not apply at all because the initial liquidations were simply void, then even the Customs Service could not invoke the provision (within one year) to correct an error in the "liquidation[s]."

[7] The court of appeals also noted (Pet. App. 12a) that, although petitioner asserted that notices of the liquidation were inadequate, the complaint contains no count based on that claim and the trial court did not mention it. "We think the adequacy of notice is not a separate issue for us to decide, but an added circumstance for the assertion of unjust enrichment" (*ibid.*), over which the court found it lacked jurisdiction.

In challenging the 1980 liquidations, petitioner plainly failed to comply with the conditions set by the statutes specifically designed for such cases. Under 19 U.S.C. 1514(a) and (c)(2), a liquidation like those at issue here is "final and conclusive" unless a protest is filed within 90 days or reliquidation is sought under Section 1520(c).[8] Petitioner did not file a protest to challenge the 1980 liquidations within 90 days. And its request for reliquidation under Section 1520(c) was out of time, because it was not filed within the one-year period allowed by that provision. Accordingly, the government, acting under 19 U.S.C. 1515, properly denied the protest challenging the refusal to reliquidate under Section 1520(c), and the courts below properly rejected petitioner's attempt to contest that denial in a suit brought under the jurisdictional grant in 28 U.S.C. 1581(a).[9]

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[8] Section 1514(a) states, in pertinent part: "Except as provided in * * * section 1520 * * *, decisions of the appropriate customs officer, including the legality of all orders and findings entering into the same, as to * * * (5) the liquidation of reliquidation of an entry * * * and (7) the refusal to reliquidate an entry under section 1520(c) of this title, shall be final and conclusive upon all persons * * * unless a protest is filed in accordance with this section, or unless a civil action contesting the denial of a protest, in whole or in part, is commenced * * *."

Section 1514(c)(2) states, in pertinent part: "A protest of a decision, order, or finding described in subsection (a) of this section shall be filed with such customs officer within ninety days after but not before—(A) notice of liquidation or reliquidation, or (B) in circumstances where subparagraph (A) is inapplicable, the date of the decision as to which protest is made."

[9] 19 U.S.C. 1515 describes the administrative process for review of a protest filed under 19 U.S.C. 1514, including a

The courts also properly rejected petitioner's attempt to invoke the catchall residual grant of jurisdiction in 28 U.S.C. 1581(i). "Section 1581(i) jurisdiction may not be invoked when jurisdiction under another subsection of § 1581 is or could have been available, unless the remedy provided under that other subsection would be manifestly inadequate." *Miller & Co.* v. *United States*, 824 F.2d 961, 963 (Fed. Cir. 1987), cert. denied, No. 87-676 (Jan. 25, 1988); see also *National Corn Growers Ass'n* v. *Baker*, 840 F.2d 1547 (Fed. Cir. 1988); *United States* v. *Uniroyal, Inc.*, 687 F.2d 467 (C.C.P.A. 1982); *American Air Parcel Forwarding Co.* v. *United States*, 718 F.2d 1546 (Fed. Cir. 1983), cert. denied, 466 U.S. 937 (1984). Otherwise, the residual jurisdiction could be used to circumvent the specific conditions Congress established for review under other subsections of Section 1581—*e.g.*, the time limits set for suits covered by Section 1581(a). In this case, Section 1581(a) jurisdiction was available: petitioner could have requested reliquidation within the one-year period prescribed by Section 1520(c)(1); if its request had been denied, it could have filed a protest pursuant to 19 U.S.C. 1514; and upon denial of the protest under 19 U.S.C. 1515, petitioner could have filed suit in the Court of International Trade under 28 U.S.C. 1581(a). Moreover, because petitioner has not established a lack of effective notice of the liquidations, the protest remedy under Section 1581(a) was

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protest (see 19 U.S.C. 1514(a)(7)) from a refusal to reliquidate under Section 1520(c). In turn, 28 U.S.C. 1581(a) states: "The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under [19 U.S.C. 1515]."

not "manifestly inadequate." Jurisdiction under 28 U.S.C. 1581(i) was therefore unavailable.

Petitioner renews its attempt to escape that conclusion by invoking the "void liquidation" theory. Under that theory, the one-year period specified in Section 1520(c) never commenced because the liquidations of petitioner's 16 entries in 1980 were ultra vires and hence void. The courts below correctly rejected this argument as well.

First, the 1979 *Deringer* decision, which was a binding precedent, rejected the theory that an invalid liquidation could be treated as a nullity and thereby not start the running of prescribed time limits for relief. Since that decision, Congress has several times amended the provisions that govern the filing and judicial review of challenges to liquidations (*e.g.*, 19 U.S.C. 1514, 1520; 28 U.S.C. 1581), but it has made no modification to cast doubt on the *Deringer* ruling. See, *e.g.*, Trade and Tariff Act of 1984, Pub. L. No. 98-573, §§ 210(b), 212(b)(7)(B), 612(b)(1), 98 Stat. 2977, 2984, 3034; Customs Courts Act of 1980, Pub. L. No. 96-417, §§ 201, 601(5), 605, 94 Stat. 1728, 1744-1745. In any event, the void liquidation theory is wholly unfounded in statutory language, and it plainly undermines the time limits and other procedural requirements of Sections 1514 and 1520(c). The theory thus is contrary to the important congressional policy of channeling specified challenges into carefully designed review processes and of ensuring finality after specified times in the numerous liquidation decisions made each year.[10] Moreover, the theory offers no coherent

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[10] While petitioner argues at great length (Pet. 16-25) that *Deringer* misread the 1970 Congress's intent in deleting certain words from the statute, neither *Deringer* nor the decision

basis on which to distinguish the errors that must be corrected through the prescribed statutory mechanisms, including failures to follow any of numerous statutes, regulations, and orders, from those which are sufficiently grave to render a liquidation ultra vires or "void." [11] Accordingly, the court of appeals

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in this case rests on that deletion. *Deringer* cited the deletion merely as confirmation of its finding of a "pervasive requirement throughout the statute to channel all non-excepted protests through § 1514 even when those protests go to the legality of a custom official's action" (593 F.2d at 1021). And the court below expressly declined to rely solely on *Deringer* as precedent or on the 1970 legislative change, concluding that the void liquidation theory was contrary to the statutory scheme because it "appears to be an abstraction having no function except to thwart the efforts of Congress to identify issues of fact and law for prompt administrative or judicial disposition, and to put permanently to rest issues not thus promptly identified for disposition" (Pet. App. 15a).

[11] Customs officials are required to liquidate entries in conformity with numerous applicable statutes, regulations, and orders, including those issued by agencies such as the Food and Drug Administration, Environmental Protection Agency, Internal Revenue Service, and Department of Agriculture. See, *e.g.*, 19 C.F.R. Pts. 11, 12. Moreover, in some cases, Customs may be required to suspend the liquidation of certain entries pending further investigation or other action. See, *e.g.*, 19 C.F.R. 159.55. It is not clear why a violation of even a statutory duty to suspend is any different in kind from a violation of any of numerous other constraints on customs officials' actions. *Ambassador Div. of Florsheim Shoe* v. *United States*, 748 F.2d 1560 (Fed. Cir. 1984), and *American Permac, Inc.* v. *United States*, 642 F. Supp. 1187 (Ct. Int'l Trade 1986), on which petitioner relies (Pet. 14-15) to establish the duty in this case, merely upheld the government's reliance on a statute-based suspension of liquidation. Neither involved an effort to enforce any such suspension against the government; neither suggested that the critical time limits on importers' challenges set by Sections 1514 and 1520(c) could

correctly concluded that, at least where, as here, there is no valid claim of lack of notice of a liquidation, there is no justification for judicial recognition of an ill-defined extra-statutory means of avoiding the procedures and time limits established by Congress for challenging liquidations.[12]

Petitioner's suggestion (Pet. App. 12-13) that the decision of the court of appeals is contrary to decisions of this Court and of other courts of appeals is patently meritless. None of the relied-on decisions involves the current customs statutes. None involves a claim that an allegedly "void" action of which the plaintiff had knowledge did not begin the running of a statutory time limit for challenging the action. To

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be ignored; and neither intimates that a liquidation effected prior to the annual review under 19 U.S.C. 1675 of outstanding CVD orders should be characterized as an ultra vires act as opposed to an error that is remediable by a protest under Section 1514 or a request for reliquidation under Section 1520(c).

[12] Petitioner asserts that the decisions of the lower courts in this case have "placed upon importers the duty of checking bulletin notices of liquidation, at the numerous Customs houses where their merchandise is imported, even during the period when there should be no liquidations under law, in the eventuality that the Government has unlawfully liquidated them" (Pet. 28-29). But neither the trial court nor the court of appeals in this case found that notice to petitioner of the liquidations was inadequate (see Pet. App. 12a). Indeed, the practice of posting bulletin notices of liquidation has been in effect for more than 80 years. See *United States* v. *Charles H. Wyman & Co.*, 156 F. 97, 99 (8th Cir. 1907) (the importer is "bound to take notice of the liquidation bulletin sheet posted for inspection by importers"); *Frederick Wholesale Corp.* v. *United States*, 754 F.2d 349 (Fed. Cir. 1985). It would be both novel and unwarranted to allow an end-run around statutory procedures on the ground that petitioner simply failed to recognize a legal error in an adverse action of which it was aware.

the extent those decisions speak of "void" actions by public officials—a characterization that in some settings means nothing more than that the actions are invalid—they do so in contexts far removed from this case.[13]

Finally, the decisions relied on by petitioner (Pet. 12 n.2) that were rendered by courts that are now within the Federal Circuit cannot create a conflict warranting this Court's review. That is especially so with respect to a claim, such as petitioner's, that is based on an extra-statutory doctrine created by such courts. In any event, the relied-on decisions all predate both *Deringer* and the subsequent congressional revisions of the pertinent statutes. And even

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[13] *Addison* v. *Holly Hill Fruit Prods., Inc.*, 322 U.S. 607 (1944) (regulation is invalid under Fair Labor Standards Act); *FTC* v. *Raladam Co.*, 283 U.S. 643 (1931) (FTC has no jurisdiction over a product in which there is no competition); *Waite* v. *Macy*, 246 U.S. 606 (1917) (Secretary of Treasury has no jurisdiction to exclude tea imports based on an unlawful purity test); *Norton* v. *Shelby County*, 118 U.S. 425, 441, 449 (1886) (bonds are void that were issued by a county board that had no lawful existence; legality of body was "from the outset * * * resisted by legal proceedings"); *Director, OWCP* v. *National Mines Corp.*, 554 F.2d 1267 (4th Cir. 1977) (administrative hearings under black-lung-benefits program, if conducted by unauthorized officers, would be invalid, but officers appointed by Secretary of Labor were in fact authorized); *United States* v. *Soto-Soto*, 598 F.2d 545 (9th Cir. 1979) (search was illegal because agent who conducted the search was not authorized by law to do so).

*Marriott* v. *Brune*, 50 U.S. (9 How.) 619, 636 (1850), also cited by petitioner (Pet. 12-13), actually supports the insistence on finality in this case. The Court there held that a protest made after initial payment of duties was timely if, but only if, the "final adjustment" had not taken place and the payment had not been transferred by the collector to the Treasury.

*Cajo* and *Mason*, on which petitioner chiefly relies, did not establish any broad principle: as *Deringer* explained, "*Cajo* and *Mason* were the result of extraordinary factual and legal situations requiring unique remedies." 593 F.2d at 1020.[14]

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[14] *Cajo* involved a liquidation under a presidential proclamation later declared unlawful, and *Mason* involved a liquidation under a Puerto Rico statute later declared unconstitutional. *Balfour, Guthrie & Co.* v. *United States*, 67 Cust. Ct. 173 (1971), on which petitioner also apparently relies, followed *Cajo* and *Mason* where a liquidation was effected under a presidential proclamation later declared invalid.

Four of the remaining decisions cited by petitioner simply involved holdings that certain presidential proclamations, statutes, or findings were invalid, and hence "void" in a sense having nothing to do with any questions regarding the timeliness of challenges. *United States* v. *Schmidt Pritchard & Co.*, 47 C.C.P.A. 152, cert. denied, 364 U.S. 919 (1960) (presidential proclamation); *United States* v. *Prym*, 17 C.C.P.A. 180 (1929) (underlying finding); *Falcon Sales Co.* v. *United States*, 47 Cust. Ct. 129 (1961), appeal dismissed, 49 C.C.P.A. 139 (1962) (presidential proclamation); *Pan American Standard Brands Co.* v. *United States*, 43 Cust. Ct. 122 (1959) (Puerto Rico law). The other decisions cited by petitioner are also all readily distinguishable. *Stubbs* v. *United States*, 7 Ct. Cust. App. 399 (1917) (a liquidation while the appraisement is on appeal is void, and hence the importer, which participated in the appellate proceeding, could not assert the finality of such a premature liquidation as a ground for invalidating a post-appeal, correct liquidation); *United States* v. *Astra Bentwood Furniture Co.*, 28 C.C.P.A. 205 (1940) (the liquidation notice was so defective that the importer had no actual notice); *Nozaki Bros.* v. *United States*, 41 Cust. Ct. 245 (1958) (although the court based its ruling on the voidness of a liquidation effected contrary to a binding judgment, in fact the importer timely sought relief under Section 1520(c)).

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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